STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2008
v	No. 277861 Hillsdale Circuit Court
DAVID LEE CARPENTER, Defendant-Appellant.	LC No. 06-301232-FH

Before: Meter, P.J., and Hoekstra and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for third-degree criminal sexual conduct, MCL 750.520d(1)(b), and assault with intent to commit criminal sexual conduct, MCL 750.520g(1). Defendant was sentenced to 72 months to 180 months' imprisonment for each of the two counts of third-degree criminal sexual conduct and 57 months to 120 months' imprisonment for the assault with intent to commit criminal sexual conduct conviction with credit for 47 days; the three sentences to run concurrently. We affirm.

On appeal, defendant first contends that Michigan's sentencing guideline scheme is a mandatory scheme that violates federally guaranteed constitutional rights to have all factors, which increase a defendant's sentence, proven beyond a reasonable doubt. Michigan's sentencing guideline scheme has been upheld by the Michigan Supreme Court in *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006). This decision is precedentially binding, and we are bound to follow it. *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000) (a decision of the majority of justices of the Michigan Supreme Court is binding on lower courts). As a result, defendant's argument fails.

Defendant next argues that the trial court erred when it scored 50 points for offense variable (OV) 7, MCL 777.37, because defendant's conduct did not rise to the level of sadism or torture. Defendant asserts that his spanking of the victim with a spatula was done for a sexual purpose and was not done for the purpose of enjoying the infliction of humiliation and extreme pain. Further, defendant argues the 50-point score defendant received for OV 7 was already accounted for in the circumstances of the crime. We disagree.

A trial court's calculation of a sentencing guidelines range is reviewed for whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). MCL

777.37(1)(a) provides that 50 points should be scored for OV 7 if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." "'[S]adism' means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). There does not have to be physical abuse in order to score 50 points. *People v Mattoon*, 271 Mich App 275, 278; 721 NW2d 269 (2006). "While humiliation may have a physical component, there does not have to be physical abuse in order to produce humiliation. Emotional or psychological abuse can certainly have that effect as well." *Id.* In *People v Hornsby*, 251 Mich App 462, 468-469; 650 NW2d 700 (2002), the scoring of 50 points was upheld "based on the pointing and cocking of a gun, as well as the making of verbal threats, but apparently no actual physical abuse." See *Mattoon, supra* at 279.

The testimony at trial indicated that while the victim was "passed out" after drinking several alcoholic beverages, defendant took her to his apartment, took off all her clothes and tied her hands and feet to a bed. The last thing the victim remembered was being at a bar with defendant and another acquaintance before the incident at issue. The victim woke up in defendant's apartment and did not know where she was. She was naked, tied to a bed, and defendant, who was also naked, was kissing and fondling her. The victim testified that she repeatedly told defendant to stop. His response to her was, "Shut up, you bitch," or something similar. When the victim repeatedly screamed, defendant told her to stop screaming and hit her in the face, backhanded her in the face and hit her with a spatula on the butt. Defendant put his fingers inside the victim's vagina and said, "Shut up; behave." The victim testified that defendant forced her to perform oral sex on him by threatening her with a spatula and saying that if she did not perform oral sex on him, he would stick the spatula inside her vagina.

Defendant did not untie the victim until an acquaintance of the victim's arrived at defendant's apartment and pounded on his door looking for the victim. It was at this time that defendant told the victim that he would kill her if she told anyone about what he had done to her. The testimony indicated that when the victim came to the door in her bra and panties, she was hysterical, frightened, scared, crying, sobbing and shaking.

Offense variable 7 was properly scored at 50 points for sadism or conduct designed to substantially increase the fear and anxiety that the victim suffered during the offense. Bringing the victim to an unknown location, taking off her clothes, tying her to a bed and repeatedly hitting and threatening her constituted humiliation, and substantially increased the fear and anxiety that she suffered during the offense. By its very nature, being restrained in the manner that the victim was restrained, is conduct that would be designed to substantially increase fear and anxiety in the victim. Further, defendant's own claim that the use of the spatula was sexual confirms that defendant's conduct was for his own gratification.

Additionally, we reject the argument that defendant's conduct was already accounted for in the circumstances of his crime. Specifically, defense counsel argues that the sentencing court could only base a departure on a characteristic already taken into account by the sentencing guidelines, the brutality of the crime, if it found that the characteristic was given inadequate or disproportionate weight. Defense counsel cites MCL 769.34(3)(b) in support of this proposition. MCL 769.34(3)(b) relates to the circumstances in which a departure from the sentencing guidelines is justified. The trial court did not depart from the sentencing guidelines in this case;

therefore, this argument has no merit. Moreover, humiliation and conduct designed to increase the victim's fear and anxiety was not accounted for in the circumstances of the crime.

Finally, defendant argues that he was denied the effective assistance of counsel because defense counsel made no effort to present evidence that the victim had been beaten by her husband on the day of the offense. According to defendant, this evidence was critical to the defense because it corroborated the assertion that the victim, who had been caught cheating on her husband, had made up the story to protect herself from her abusive husband.

To preserve the issue of effective assistance of counsel, a defendant must move for a new trial or an evidentiary hearing before the trial court. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Failure to move for a new trial or *Ginther*[1] hearing usually forecloses appellate review unless the appellate record contains sufficient detail to support defendant's claims. *Marji, supra*. Defendant did not move for a new trial nor did he seek an evidentiary hearing before the trial court. Therefore, we review the issue based on the existing record. *Id*.

To establish ineffective assistance of counsel during trial, defendant must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To establish that his trial counsel's performance was deficient, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Toma, supra*. Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

The evidence supports the conclusion that the jury was implicitly informed that the victim had a physical altercation with her husband on the morning of October 14, 2006. Evidence was presented that there was an altercation, and the victim's husband had "gone with the cops." Further, defense counsel argued and defendant asserted that the victim was acting consensually and only became concerned about what she was doing when she thought her husband would find out about it. Although the record does not indicate that defense counsel specifically elicited testimony about the physical nature of the altercation between the victim and her husband and about any fear she may have of her husband, the decision not to elicit testimony on these matters falls in the category of trial strategy. *Toma, supra* at 302. It would be inappropriate for this Court to substitute its judgment for defense counsel's judgment in this matter. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001) (Michigan Court of Appeals will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight). The issue was raised before the jury, even if not to the extent desired by defendant.

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

The record does not support defendant's contention that he received ineffective assistance of counsel. Defense counsel did not make such a serious mistake without which the results of defendant's trial might reasonably have been different. *Id*.

Affirmed.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto